STATE OF MICHIGAN

COURT OF APPEALS

EMPLOYEES ONLY, INC., HUMAN RESOURCES STRUCTURE, INC., and MOTOR CITY HUMAN RESOURCES, INC.,

Plaintiffs/Counter-Defendants/Appellees,

v

MARK S. PROVENZANO,

Defendant/Appellant

and

CCS, LLC d/b/a COLUMBIA CONSTRUCTION SERVICES,

Defendant/Counter-Plaintiff/Third-Party Plaintiff/Appellant

V

MARIO APRUZZESE and JANICE GRADOWSKI,

Third-Party Defendants/Appellees.

UNPUBLISHED
May 3, 2011

No. 296575
Macomb Circuit Court
LC No. 08-005693-CK

Before: SERVITTO, P.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM.

Defendants CCS, LLC and Mark S. Provenzano appeal as of right from the trial court's amended opinion and order granting final judgment for plaintiffs and its order awarding plaintiffs costs and attorney fees. We affirm in part, reverse in part, vacate in part, and remand for further proceedings.

I. BACKGROUND

This dispute arises out of a written Client Services Agreement (the Agreement) entered into by plaintiff Employees Only, Inc (EOI) and CCS, LLC (CCS).[1] The Agreement was executed by CCS through Provenzano. Under the Agreement, EOI provided paperwork and administrative duties for CCS, including wage and benefit payments. The Agreement provided that EOI would send CCS an invoice "in advance" of the payroll date "and such invoice will be paid no later than 48 hours before the scheduled distribution of the payroll." CCS was entitled to dispute, in writing, the accuracy of any invoice, but was "required to pay the disputed invoice as provided herein," although such payment would not be deemed a waiver of CCS' right to dispute the invoice's accuracy. The Agreement further provided that "The Client, along with its officers and owners, shall remain liable for the Client's failure to meet its financial obligations herein." Section B under the "Fees Schedule" heading provides:

> Default in Payment. Any invoices not paid when due shall be assessed an administrative charge equal to 5% of the invoice and any unpaid amounts shall accrue at the rate of 1 ½ % per month until paid in full. The payment of the administrative fee and interest does not relieve Client [CCS] of its liability to the Company [EOI] for damages suffered as a result of its default and nonpayment. The Client acknowledges that where it has failed to pay invoices when due, the Company has the option, in its sole discretion, of not paying the payroll for the applicable pay period or paying only those minimum amounts required by an employer to be paid for state and federal withholding and/or as required by the FLSA or state minimum wage law. *The Client agrees that as co-employer, its officers shall be personally liable for amounts not paid under this Agreement pursuant to Company invoices*.

During 2008, CCS fell behind on its payments to plaintiffs. Although CCS did not have sufficient funds in its bank account to pre-pay EOI for the wages and benefits as required under the contract, plaintiffs elected to continue disbursing the checks on behalf of CCS. CCS then paid back plaintiffs by check after the disbursements were made, although the lag between disbursements and payments became greater and some of the checks provided to plaintiffs by CCS were returned for insufficient funds. During this time, Provenzano was routinely in contact with plaintiffs, promising payments, establishing payment plans, and issuing his personal checks for various invoices, which checks were held as security until CCS paid. By October 2008, CCS stopped paying plaintiffs altogether, and was approximately six weeks behind in payments.

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[1] CCS is owned and personally managed by its principal officer, Provenzano. EOI is operated by its owner, counter-defendant Mario Appruzzese, and its president, counter-defendant Janine Gradowski. Plaintiffs Human Resources Structure, Inc. and Motor City Human Resources, Inc. are owned or affiliated with EOI and were assigned portions of the Agreement by EOI.

Plaintiffs ultimately terminated the work. Around the same time, CCS went out of business and was reduced to one employee, Provenzano.

EOI filed suit against defendants alleging breach of contract, unjust enrichment, fraud and misrepresentation, and constructive fraud/trust. CCS filed a counterclaim against EOI and a third-party complaint against Apruzzese and Gradowski, alleging breach of contract against EOI, fraudulent inducement against EOI, Apruzzese and Gradowski, silent fraud against EOI, Apruzzese and Gradowski, promissory estoppel against EOI, Apruzzese and Gradowski, and tortious interference with contractual relations against Apruzzese and Gradowski.

Plaintiffs filed for summary disposition against defendants as to their breach of contract claim only, and sought dismissal of CCS' counter and third-party complaint. Defendants responded, arguing that Provenzano had no personal liability under the Agreement because he had signed only in his representative capacity, but that, at a minimum, there was a question of fact as to his intent when he signed the Agreement, which would preclude summary disposition. Defendants further argued that they provided evidence of their payments to EOI, which were undisputed, and that the cumulative total of those payments resulted in a lesser amount being due than EOI claimed, such that there were questions of fact as to the amount due which precluded summary disposition.

The trial court issued its ruling without holding a hearing. As to Provenzano's liability, the trial court held that, although Provenzano clearly signed in his representative capacity,

> it is clear from the face of the agreement that the Client, "*along with its officers and owners*, shall at all times remain liable for the Client's failure to meet its financial obligations herein" (emphasis added), *id.* at 7, stating further "[t]he Client agrees as co-employer, its officers shall be personally liable for amounts not paid under this Agreement." *Id.* Thus, the Court finds defendant Provenzano to be personally liable under the plain language of the parties' agreement.

As to damages, the trial court held:

> Plaintiffs have proffered evidence that they are owed $132,548 for unpaid fees, $17,893 in interest, $10,165 in legal fees, $10,500 in termination fees and additional administrative costs of $4,775 for a grand total of $172,466 (after allowance for a credit of $3,415).
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> Significantly, defendant CCS does not dispute owing money to plaintiffs, just the amount of money owed. However, defendant CCS has not proffered any evidence to dispute the amount of unpaid fees, interest charges and/or additional administrative costs. Hence, plaintiffs are entitled to summary disposition with respect to same.
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> * * *
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> The parties do not dispute the Client Services Agreement has been terminated. Thus, plaintiffs are entitled to the early termination fee of $250 per employee. However, plaintiffs have not proffered any evidence suggesting

> defendant failed "to have benefits and insurance for the Worksite Employees replacing the coverages and plans being provided by the Company under this Agreement" so as to entitle plaintiffs to an additional administration fee of $500 per employee. Hence, plaintiffs are only entitled to summary disposition in their favor with respect to termination fees of $250 per employee.

The trial court denied summary disposition as to plaintiffs' attorney fees because they had not provided any evidentiary support for their reasonableness, but permitted them to submit the required proofs for consideration. The trial court also denied all of CCS' claims against EOI, Apruzzese and Gradowski for failure to proffer any evidence in support thereof. It further concluded that CCS did not establish that plaintiffs' allocation of payments to the oldest invoices first violated the Agreement or generally accepted accounting principles and that CCS' "calculations" of its payments were neither substantiated nor verified. Accordingly, the trial court dismissed CCS' counter complaint and third-party complaint with prejudice.

In an amended opinion and order, the trial court noted that, "[g]iven the Court's resolution of the matter based upon the parties' contract, and defendant's breach thereof, the Court never reached plaintiffs' remaining claims, the counterclaims, or third-party complainant's claims." The trial court further noted that the issue of attorney fees had not been resolved, but recognized that it did not preclude the order from being "final" for the purposes of MCR 7.202(6)(a)(i). Subsequently, plaintiffs filed a detailed itemization of attorney fees to which defendants filed objections. The trial court's order noted that plaintiffs and defendants stipulated to a reasonable amount and held that defendants were liable, "jointly and severally," for $20,606.25 in attorney fees.

Defendants appeal both the summary disposition order, as well as the order granting attorney fees to plaintiffs.

II. ANALYSIS

A. STANDARD OF REVIEW

Although plaintiffs' motion was brought as a (C)(8) motion, the trial court recognized that the parties relied on matters outside the pleadings and construed the motion as being brought under (C)(10). We review de novo a trial court's decision on a summary disposition motion under (C)(10). *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). All relevant documentary evidence is viewed in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists. *Id.* Contract interpretation presents a question of law that also requires de novo review. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

B. PROVENZANO'S PERSONAL LIABILITY

On appeal, defendants argue that Provenzano cannot be held personally liable under the Agreement because he signed it only in his representative capacity. Because the Agreement is a contract, we look to the rules of contract interpretation.

"The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994). The parties' intent is determined from the words utilized in the contract. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). "This court does not have the right to make a different contract for the parties or look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning." *Id.* (citations omitted). If the contract language is clear and unambiguous, its interpretation is a question of law. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996).

Under these rules, it initially appears that the trial court properly found Provenzano personally liable. The Agreement explicitly provided that the "officers and owners" of CCS "shall remain liable" for CCS' failure to meet its financial obligations under the Agreement and, in a separate subsequent provision, reiterated that CCS' "officers shall be personally liable for amounts not paid under this Agreement . . . ." There is nothing unclear about this language; the parties intended for Provenzano to be personally liable to the extent that he was an officer or owner of CCS. See *id.*

However, Michigan's statute of frauds, MCL 566.132(1), provides in relevant part:

> In the following cases an agreement, contract, or promise is void unless that agreement, contract or promise . . . is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:
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> * * *
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> (b) A special promise to answer for the debt, default, or misdoings of another person.

It is undisputed that the contract was signed by CCS through Provenzano in his representative capacity and the law is clear that an officer of a corporation cannot be held liable on a corporation's written contract where it is executed for the corporation "by" that officer. See generally 19 Am Jur 2d *Corporations* §§ 1341-1346; 19 CJS *Corporations* §§ 837-840. Accordingly, the Agreement does not appear to satisfy the statute of frauds in this regard because the officers and owners have not signed in their individual capacities to make themselves personally liable.

Yet, the present case is distinguishable from the general rule because the terms of the Agreement purport to bind CCS' officers. Indeed, the contract language could not express a clearer intent to bind the officers and owners individually. Furthermore, contract signatories are deemed to know and held to the terms of the contract. *Scholz v Montgomery Ward & Co, Inc*, 437 Mich 83, 92; 468 NW2d 845 (1991). Thus, Provenzano, as the person executing the Agreement on behalf of CCS, knew, or is deemed to have known, that the Agreement sought to hold him personally liable for the corporation's obligations.

If this case involved the liability of owners and officers who had not executed the Agreement in any capacity, there would be no liability imposed. Similarly, had Provenzano provided a second signature indicative of personal liability, his personal liability would be

without question. We are presented with neither of these fact patterns, however. Rather, the question presented here is whether a corporate officer may be personally bound by a contract he executed on behalf of the corporation where the contract language expressly provides for his personal liability.

Here, the signature blocks in the Agreement provide no place for additional signatures for individuals to signal they accept personal liability apart from the corporation, which explicitly conflicts with the previously cited provisions that call for such liability. Under these circumstances, we conclude that the Agreement is ambiguous. *Dancey v Travelers Prop Cas Co of America*, 288 Mich App 1, 8; 792 NW2d 372 (2010), quoting *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003) ("A contract is ambiguous when two provisions 'irreconcilably conflict with each other.'"). Accordingly, the intent of the parties cannot be determined from the language of the Agreement alone, rendering summary disposition inappropriate. See *Port Huron Ed Ass'n*, 452 Mich at 323 ("Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact.").

We believe that our determination of a question of fact based on contractual ambiguity harmonizes all of the aspects of contract law at play. It recognizes that personal liability may not exist because the signature is purported to be in a representative capacity, while also permitting the contrary conclusion given the express contractual provisions and the law that deems signatories knowledgeable of a contract's contents. Rather than resolving the tension between these propositions by declaring that one proposition shall always trump the other when they are in conflict, it adheres to the tenets of contractual interpretation and its stated goal of determining the intent of the parties. Thus, a corporate officer who signs in a representative capacity but not an individual capacity will only be held personally liable where a factfinder determines that he so intended when he executed a contract providing for personal liability. If the factfinder determines the officer's sole intent was to sign in a representative capacity, there is no personal liability, consistent with the general rule.

To summarize, we hold that, where the express language of the contract provides for personal liability of a corporation's owners or officers, but the signatures are only in their representative capacity, an ambiguity regarding the signatories' intent is created based on the conflict between the language and the signature, which ambiguity requires resolution by a fact-finder.[2] However, the ambiguity exists only as to those officers or owners who signed in their

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[2] Although not binding upon this Court, we note that our holding is consistent with *United States v Prod Plated Plastics, Inc*, unpublished opinion of the United States District Court for the Western District of Michigan, issued November 19, 1990 (Docket No. K87-138 CA) at 11-12:

> [I]f a corporate officer signs a document and indicates his corporate affiliation next to his signature, then absent evidence of contrary intent the officer is not personally bound. But where the terms of the document conflict with the apparent representation by the officer's signature, an issue of fact as to the officer's intent arises. [Citations omitted.]

representative capacity; if they have not executed the contract in any capacity, there is no liability. Thus, in the instant case, there is a question of fact concerning Provenzano's intent in signing the Agreement that precluded the trial court's grant of summary disposition. Accordingly, we reverse the trial court's grant of summary disposition against Provenzano only and remand for additional proceedings.

C. DAMAGES

Defendants next contend that summary disposition was inappropriate because there was an outstanding factual dispute as to the amounts owed. We disagree.

Defendants argued both below and to this Court that EOI improperly imposed finance charges and late fees and that those fees were "astronomically high" because plaintiffs improperly applied payments to past fees and charges rather than reimbursing the amounts necessary for payroll, taxes, 401K contributions and benefit payments on subsequent invoices. However, defendants fail to provide any basis for their contention that this method of payment was inappropriate, whether under the Agreement, based on past practice, or pursuant to a generally accepted method of accounting.

Indeed, in his deposition testimony, Provenzano could not point to any documents in support of CCS' position, or provide a verbal explanation of the claims, expressing repeatedly only that his investigation was not complete, even though it had been over seven months since suit had been filed. When asked whether he had any "writings that were executed or delivered" between himself and plaintiffs that would show some other amount was owed than what plaintiffs' claimed, he stated simply "I'm not sure."

Although defendants attached some payment summaries to their brief in support of their response to plaintiffs' motion for summary disposition, as the trial court noted, the "'calculations' of its payments are neither substantiated [n]or verified." The documents, which appear to be created solely for the purposes of litigation and not kept in the ordinary course of business, are simply charts that provide no indication of where the information was obtained and there are no affidavits attesting to the accuracy of the information or indicating that someone could testify regarding the information on which the summaries are based. Provenzano's affidavit, attached to defendants' response to plaintiffs' motion for summary disposition, speaks only to the Agreement and his intention when signing it. It contains no statements disputing the amount owed. Therefore, all the trial court had was a possibility that defendants' calculations were admissible evidence and, generally, a mere possibility is insufficient to survive summary disposition. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). The only record evidence was that plaintiffs were owed $155,301.[3] There being no evidence to create a factual dispute, the trial court properly granted summary disposition on the amount of damages.

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[3] Although plaintiffs originally claimed a higher amount, the trial court explained why the evidence only entitled plaintiffs to this reduced amount.

D. ATTORNEY FEES

In light of our determination that summary disposition was improperly granted as to Provenzano, we vacate the award of attorney fees against Provenzano only. However, on remand, if the factfinder determines that Provenzano is personally liable under the Agreement, plaintiffs' attorney fees may again be assessed against him. Additionally, plaintiffs are not precluded from arguing that they are entitled to additional attorney fees from CCS, and from Provenzano if he is determined to be personally liable, for the continued litigation.

III. CONCLUSION

We reverse the trial court's grant of summary disposition against Provenzano only, affirm the trial court's award of damages, vacate the award of attorney fees against Provenzano only, and remand for additional proceedings consistent with this opinion.[4] We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Donald S. Owens

[4] Because defendants did not appeal the trial court's dismissal of CCS' counter and third-party claims, they may not be relitigated on remand.